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11 UNITED STATES DISTRICT COURT  
12 CENTRAL DISTRICT OF CALIFORNIA

13

14 **JOSHUA ASSIFF,**

15 **Plaintiff,**

16

v.

17

**COUNTY OF LOS ANGELES;  
SHERIFF DEPUTY BADGE  
NUMBER 404532;  
And DOES 1 through 10,**

18

**Defendants.**

19

20

21 **Case No. 2:22-cv-05367 RGK (MAAx)**

22

23 **MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
DEFENDANTS' MOTION IN LIMINE  
#1**

24

25 Action Filed: August 3, 2022  
Pretrial Conference: July 10, 2023  
Trial Date: July 25, 2023

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27 Assigned to: Hon. R. Gary Klausner,  
District Judge, Courtroom 850

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29 Plaintiff, JOSHUA ASSIFF (hereinafter "Plaintiff") hereby respectfully  
30 submits the following memorandum of points and authorities in opposition to  
31 Defendants' motion in limine #1 to preclude evidence of prior or subsequent  
32 complaints, discipline, administrative investigations or proceedings, or other alleged  
33 incidents.

34

35 **I. INTRODUCTION**

36

37 Plaintiff is a 21-year old black male and a student at Antelope Valley College  
38 where he plays basketball. Plaintiff was driving from his home to a teammate's house

1 in order to carpool to basketball practice. For no apparent reason and without  
2 probable cause, KELLY, a male Caucasian motorcycle Sheriff deputy, pulled  
3 Plaintiff over. For no apparent reason and without probable cause, KELLY – as well  
4 as other deputies who subsequently responded to the call – all tasered, choked, pepper  
5 sprayed, beat and arrested Plaintiff. Plaintiff has asserted the First Cause of Action  
6 against KELLY for violation of 42 USC § 1983 (arrest without probable cause and  
7 with excessive force).

8 Plaintiff Assiff will seek to introduce evidence of prior or other incidents  
9 involving Defendant Kelly in which Defendant Kelly was rude and abusive to  
10 motorists, in which Defendant Kelly failed to use de-escalation techniques and  
11 unnecessarily escalated incidents, and in which Defendant Kelly was alleged to have  
12 improperly used force against an inmate.

13 In July of 2013, Defendant Kelly was rude to a motorist during a traffic stop.  
14 He threw the driver's license back at the motorist (a nurse), took back the citation,  
15 changed it, gave it back to the motorist, and said, "now it's double."

16 In November of 2019, Defendant Kelly was dealing with a motorist involved  
17 in a collision. The motorist complained that Defendant Kelly was incomplete,  
18 defensive, disrespectful and condescending. The Department investigated and  
19 concluded, "our employee could have been better."

20 In February of 2020, Defendant Kelly was accused of harassing a motorist and  
21 arresting a motorist for merely having an expired registration. After an investigation  
22 of the complaint, the Sheriff's Department again concluded, "our employee could  
23 have been better."

24 In April of 2020, Defendant Kelly was subject of a personnel complaint while  
25 dealing with a member of the public who called into the station to complain about  
26 excessive motorcycle noise. Defendant Kelly, a motorcycle cop and rider, reportedly  
27 refused to accept the report, was rude, and threatened to hang up.

28

1           In June of 2022, Defendant Kelly was once again rude to a motorist. He threw  
2 the motorist's credentials back at the motorist and told him to "enjoy your citation."  
3 After an investigation of the complaint, the Sheriff's Department once again  
4 concluded, "our employee could have been better."

5           These repeated complaints show that Defendant Kelly simply does not have  
6 the temperament, nor the manners, to be a law enforcement officer dealing with  
7 motorists and other members of the public. However, there are even more  
8 troubling incidents in Defendant Kelly's past reflecting on his disposition and  
9 temperament.

10          In June of 2014, Defendant Kelly while riding a motorcycle off-duty was  
11 himself pulled over by a sergeant with the LAPD for speeding. Defendant Kelly was  
12 rude to the sergeant, questioned where he worked, and drove off from the traffic stop  
13 before the sergeant could cite him. The Sheriff's Department investigated the  
14 incident and yet again officially concluded "the actions of [Defendant Kelly] should  
15 have been better." Internally, Defendant Kelly's supervisor found, "[y]our actions  
16 were unprofessional and your behavior brought discredit to yourself and the  
17 Department."

18          In July of 2015, Defendant Kelly was criticized for his conduct leading up to  
19 a use of force incident against an Hispanic inmate. According to reports, Defendant  
20 Kelly had a history of conflict with this Hispanic inmate. Defendant Kelly caused  
21 this inmate to be sentenced to 29 days of discipline for allegedly being disrespectful,  
22 and yet it was Defendant Kelly who had been disrespectful. He said to the inmate,  
23 "What the fuck are you, a Southsider (an Hispanic jail gang member)" After  
24 sentencing this Hispanic inmate to discipline, Defendant Kelly taunted the inmate  
25 outside his cell. Defendant Kelly called the Hispanic inmate a "faggot" and "little  
26 punk." When the inmate responded by saying he should have taken his shot at  
27 Defendant Kelly at the discipline hearing, Defendant Kelly responded, "Oh you want  
28 a chance?" Then Defendant Kelly, against department policy, ordered the inmate's

1 cell door opened, stood in the doorway, and said, “Here’s your shot.” A physical  
2 altercation between the inmate and Defendant Kelly ensued and the inmate claimed  
3 he was beaten and choked.

4 Defendant Kelly was criticized for this use of force by his supervisor for there  
5 being no video of the incident, there was no radio broadcast of the incident, and  
6 Defendant Kelly opened the cell door against department policy. An internal affairs  
7 investigation apparently resulted in Defendant Kelly being suspended for 4 days, but  
8 the suspension was not given until almost three years later in April of 2017.  
9 Furthermore, Defendant Kelly in his deposition admitted that he never served the 4  
10 day suspension.

11 **II. SERGEANT KELLY’S HISTORY OF ABUSE TOWARDS  
12 MOTORISTS, FAILURE TO USE DE-ESCALATION TECHNIQUES AND  
13 PRIOR USE OF FORCE IS RELEVANT AND ADMISSIBLE**

14 It is well established that evidence of prior and/or subsequent conduct by a  
15 defendant can be admissible. As explained in *United States v. Boone*, 828 F.3d 705  
16 (8th Cir. 2016):

17 Although evidence of a prior bad act is not admissible to show a  
18 defendant’s propensity to commit criminal acts, it is admissible  
19 under Rule 404(b) to show “**motive, opportunity, intent,  
20 preparation, plan, knowledge, identity, absence of mistake,  
21 or lack of accident.**” Fed. R. Evid. 404(b). Evidence of a prior  
22 bad act “is admissible if (1) it is relevant to a material issue, (2)  
23 it is similar in kind and not overly remote in time to the charged  
24 offense, (3) it is supported by sufficient evidence, and (4) its  
25 potential prejudice does not substantially outweigh its probative  
26 value.”

27 *Id.* at 711 (emphasis added); see also, *United States v. Ellis*, 817 F.3d 570, 579  
28

1 (8th Cir. 2016); *United States v. Bailey*, 696 F.3d 794 (9th Cir. 2012); *Sibrian v. City*  
2 *of Los Angeles*, 288 Fed.Appx. 385, (9th Cir.2008).

3 *Boone* is instructive, and employs reasoning that is equally applicable to the  
4 facts of our case:

5 Evidence of Boone's use of unreasonable force against Dooley  
6 was relevant to prove that Boone acted willfully when he  
7 deprived Hill of his right to be free from unreasonable force. To  
8 prove willfulness, the government was required to show that  
9 Boone acted with specific intent to deprive Hill of his  
10 constitutional rights. See 18 U.S.C. § 242; *United States v.*  
11 *Jackson*, 235 F.2d 925, 928 (8th Cir. 1956) (citing *Screws v.*  
12 *United States*, 325 U.S. 91, 103(1945)). By testifying that he did  
13 not intend to hurt Hill or kick him in the head, but was instead  
14 trying to assist his fellow officers in securing Hill, Boone placed  
15 his state of mind squarely at issue and rendered evidence of his  
16 prior use of unreasonable force probative of his intent,  
17 knowledge, motive, and absence of mistake in his use of force  
18 against Hill. See *United States v. Brugman*, 364 F.3d 613, 620-  
19 21 (5th Cir. 2004) (holding that the district court did not abuse  
20 its discretion in admitting evidence of a border patrol agent's  
21 prior use of excessive force to prove the agent's intent in the  
22 charged offense).

23 *Boone* at 711.

24 Further, ". . . it is generally accepted that a defendant with a  
25 propensity to commit acts similar to those charged is more likely  
26 to have committed the charged act than another and therefore  
27 such evidence is relevant and in conformity with the standards  
28 set out in Fed. R. Evid. 401 & 402." *Doe v. Glanzer*, 232 F.3d

1 1258, 1268 (9th Cir. 2000), [citing Fed. R. Evid. 401 (stating that  
2 evidence is relevant if it has a tendency to “make the existence  
3 of any fact that is of consequence to the determination of the  
4 action more probable or less probable than it would be without  
5 the evidence”); Fed.R.Evid. 402 (stating that only relevant  
6 evidence is admissible at trial); *Old Chief v. United States*, 519  
7 U.S. 172, 181 (1997)]

8 It this case, Defendant Kelly’s state of mind is at issue. His conduct towards  
9 motorists is at issue. His use of de-escalation techniques are at issue. His use of  
10 force is at issue. As permitted in *Boone*, the prior incidents are admissible to prove  
11 Defendant Kelly’s **“motive, opportunity, intent, preparation, plan, knowledge,  
12 identity, absence of mistake, or lack of accident.”**

13 Finally, Defendant Kelly’s is a crucial witness in this case, and the evidence  
14 that Defendants seek to exclude is admissible, as it is relevant to the weight or  
15 credibility of Defendant Kelly’s testimony or the other witnesses from the Sheriff’s  
16 Department that Defendants may seek to call. [Federal Rules of Evidence, Rule  
17 104(e)]

18 **III. CONCLUSION**

19 For the reasons set forth above, Defendant’s motion should be denied.

20  
21 DATED: June 30th, 2023      The Law Office Of Thomas M. Ferlauto, APC

22  
23 By: \_\_\_\_\_   
24 Thomas M. Ferlauto  
25 Attorney For: Plaintiff, JOSHUA ASSIFF